

McCorvey Sheet Metal Works, Inc. and Sheet Metal Workers Local 54. Case 16-CA-18734

September 23, 1998

DECISION AND ORDER

On April 17, 1998, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, McCorvey Sheet Metal Works, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 2(a) and (b) and reletter the subsequent paragraphs.

2. Substitute the following for former paragraph 2(c).

"(a) Within 14 days after service by the Region, post at its Houston, Texas facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respon-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find no merit in the Respondent's contention that the judge failed to take into consideration the demeanor of employee Royce Shanks during his testimony. In his decision, the judge clearly stated that his evaluation of Shanks' testimony included his "observation of the witness."

The judge erroneously stated that the Respondent admitted in its answer the allegations contained in paragraph seven of the complaint. This error does not affect our decision.

² We shall modify the recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997). In addition, we shall delete paragraphs 2(a) and (b) of the recommended Order because, contrary to the Board's usual practice, they direct the Respondent, in the affirmative portion of the Order, to refrain from engaging in further unfair labor practices.

³ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

dent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since June 2, 1997."

3. Substitute the following for former paragraph 2(d).

"(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

Robert G. Levy, II, Esq., for the General Counsel.

Samuel E. Hooper, Esq. (Neel, Hooper & Kalmans, P.C.), for the Respondent.

Patrick M. Flynn, Esq., for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on February 23, 1998, in Houston, Texas. After all parties had rested, I heard oral argument, and on the same date, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.¹ The remedy, Order, and notice are set forth below.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

On the findings of fact and conclusions of law, and on the entire record in this case, I issue the following recommended²

ORDER

The Respondent, McCorvey Sheet Metal Works, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge or other form of reprisal because of their support for Sheet Metal Workers Local 54 or any other labor organization.

(b) Interrogating employees as to whether they had distributed union literature or were members of the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

¹ [The transcript has been corrected in accordance with Appendix C, which is excluded from publication.]

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Refrain from threatening employees with discharge or other reprisal because they supported Sheet Metal Workers Local 54, or to discourage membership in any labor organization.

(b) Refrain from interrogating employees about their union membership or activities.

(c) Post at its place of business in Houston, Texas, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."³ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

111

JUDGE LOCKE: This is a bench decision in the case of McCorvey Sheet Metal Works, Inc., and Sheet Metal Workers Local 54, Case 16-CA-18734. It is issued pursuant to Section 102.35, subparagraph 10, and Section 102.45 of the Board's rules and regulations.

Respondent has admitted in its answer to the allegations raised in paragraphs one, two, three, four, five, six, and seven of the General Counsel's complaint. Based upon those admissions and the record as a whole, I make the following findings of fact:

The charge in this proceeding was filed by the Union on June 10, 1997 and a copy of it was served by first class mail on the Respondent on the same date.

At all times material, Respondent, a Texas corporation, with an office and place of business in Galena Park, Texas, contiguous to the City of Houston, Texas, has been engaged in the business of fabricating and installing sheet metal products.

During the 12 months before the date of the complaint, which issued on October 22, 1997, Respondent, in conducting its business operations described in paragraph two of the complaint, performed services valued in excess of \$50,000 directly to customers located outside the State of Texas. At all material times, Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the National

112

Labor Relations Act.

At all material times, the Union, Sheet Metal Workers Local 54, has been a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

At all material times, Raymond McCorvey, Tony McCorvey, and Billy Ware have been supervisors of Respondent within the meaning of Section 2(11) of the National Labor Relations Act.

³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Raymond McCorvey is chairman of the board of Respondent corporation and Tony McCorvey is president at present.

Respondent has denied other allegations raised by the complaint.

I find that on June 2, 1997, Royce Shanks, who was then an employee of the Respondent, distributed literature he had received from the Union to other employees. This literature consisted of photocopies of a pamphlet published by the National Labor Relations Board concerning employees' rights under the Act, and photocopies of a leaflet published by the Union concerning impermissible conduct by employers.

Shanks distributed this literature either before or during an employee safety meeting on that date. Shop Supervisor, Billy Ware, conducted this meeting. I credit his testimony that he did not realize the nature of these pamphlets during the meeting itself, but learned about it after the meeting ended when he spoke with employees about it. Ware also credibly testified that he brought this literature to the attention of higher

113

management. I find that the information he provided to higher management included the identification of Royce Shanks as the employee who had distributed the union literature.

The General Counsel suggests that Ware's testimony is implausible. However, the materials which Shanks had distributed were not colorful booklets likely to attract attention but photocopies which had little distinctiveness from a distance. It appears quite reasonable to me that Ware would not be aware of the nature of the photocopies until after the meeting when he saw them up close. It also seems reasonable that he would report this matter to higher management rather than taking any action on his own. Ware appeared to be a cautious and prudent individual unlikely to act rashly.

Moreover, based upon my observations of the witness, I credit his testimony.

When Raymond McCorvey arrived at his office that day, he learned about Shanks' distribution of literature. He told his son, Tony McCorvey, to accompany him, and they went to Shanks' work station. The testimony of Raymond McCorvey and Royce Shanks differs about what was said at Shanks' work station. In deciding which of these witnesses to believe, I give considerable weight to the fact that Tony McCorvey was also present during this encounter, and that the Respondent did not call him to testify.

When relevant evidence which would properly be part of a

114

case is under the control of the party whose interest it would be to produce it and this party fails to do so without satisfactory explanation, the trier of fact may draw an inference that such evidence would have been unfavorable to that party. See the case of *Martin Luther King, Sr. Nursing Center*, 234 NLRB 15 (1977).

In this instance, Tony McCorvey was a participant in the encounter at issue and also remained a high management official of Respondent. Respondent easily could have called him to testify. Respondent did not call him to testify and did not provide a satisfactory reason for failing to do so.

Therefore, I infer that the testimony of Tony McCorvey would not have supported the testimony of his father, Raymond McCorvey, and instead, I credit the testimony of Royce Shanks.

I find that this encounter took place at Shanks' work station about 9:30 on the morning of June 2, 1997. Additionally, I find

that Raymond McCorvey did ask Shanks if he were the one who had been passing out the Union related pamphlets. I also find that when Shanks acknowledged he had passed out the pamphlets, McCorvey asked where's mine. When Shanks offered to bring one in, McCorvey told him not to do so because McCorvey had already read the pamphlet.

Further, I find that Raymond McCorvey told Shanks that it was pretty obvious that he was in the Union and was trying to stir up trouble. Additionally, I find that McCorvey warned

115

Shanks not to "mess up."

Based upon my observations of the witness, I do not find that Raymond McCorvey added the comment "watch what you do." Shanks appeared to be somewhat tentative when he attributed these remarks to McCorvey, and I believe that might reflect Shanks' interpretation of the "don't mess up" statement as easily as being an additional warning actually given by McCorvey to Shanks. After these statements, I find the McCorveys then left the area of Shanks' work station.

Applying an objective standard, I find that this encounter clearly was coercive. The two highest management officials of the Respondent were confronting an employee about his union activities. When Raymond McCorvey asked Shanks if he were the one who had passed out the union literature, that clearly constituted interrogation of an employee in violation of Section 8(a)(1) of the Act as alleged in paragraph 7(b) of the complaint.

When McCorvey told Shanks not to mess up, that statement constituted an implied threat of reprisal. Although complaint paragraph 7(a) alleges that Respondent made a threat of discharge rather than of unspecified reprisal, in either case, the threat violates Section 8(a)(1) of the Act.

I find that this matter has been fully litigated and that Respondent violated Section 8(a)(1) of the Act by warning Shanks not to mess up in the context of questioning him about his Union

116

activities.

According to Shanks, on June 5, 1997, while he was at work, supervisor Ware told him that the McCorvey's would never go Union and that Shanks could forget about the Union. Shanks also testified that Ware asked if, in effect, Shanks thought so much—let me rephrase it.

Shanks also testified that Ware asked if Shanks thought so much about the Union, why wasn't he working in a union shop or words to that effect. It is undisputed that at this time, Shanks was wearing a button and a sign which identified him as a supporter of the Union. It is also clear that Ware already knew about Shanks distributing union literature 3 days before.

Ware denied making any of these statements which Shanks attributed to him. Based upon my observation of the witnesses, I credit Ware rather than Shanks. Therefore, I do not find that Ware made these statements and recommend that paragraph 8 of the complaint be dismissed.

In sum, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph seven of the complaint, but not as alleged in paragraph eight of the complaint.

The remedy for this violation will be for the Respondent to post a notice in which the employees are informed of their rights to engage in Union or concerted protected activities or to reframe from such activity.

Upon the receipt of the transcript of these proceedings, I

117

shall issue a written Bench Decision and Certification, which will include a recommended order and the specific language of the notice to employees which the Respondent shall post.

I shall file these documents with the Board and cause a copy of them to be served upon the parties pursuant to Section 102.45 of the Board's rules and regulations.

Under those rules, the Board will then issue an order transferring the case to the Board and will serve a copy of this order on the parties. Pursuant to Section 102.46 of the Board's rules and regulations, the time period for filing exceptions will begin to run upon service of the Board's order.

I appreciate how counsel in this case were very civil and professional in their treatment of the other side and of the witnesses and of the Bench, and thank you for your cooperation.

The hearing is closed.

(Whereupon, at 1:55 p.m., the hearing was closed.)

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with discharge or other reprisal because of their support for any union.

WE WILL NOT interrogate employees as to whether they had distributed union literature or were members of a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

MCORVEY SHEET METAL WORKS, INC